July 28, 2014

Ellen A. Pansky
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Re: Your Request for Informal Assistance
Our File No. I-14-096

Dear Ms. Pansky:

This letter responds to your request for advice regarding the financial disclosure and conflict of interest provisions of the Political Reform Act (the "Act") and application of Government Code Section 1090.

Please note that we only provide conflict of interest advice under the Political Reform Act (the "Act")[1] and Section 1090. We do not provide advice on other conflict of interest restrictions, if any, that could arise such as those governed by the common law. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

Since you ask only general questions that do not identify a specific public official, we offer only informal assistance. (Regulation 18329(b)(2)(A), (b)(8) and (c).) For purposes of the Act, informal assistance does not provide the requestor with the immunity set forth in Sections 83114(a) or (b). (See Regulation 18329(b)(8)(C) and (c)(1) and (3).) Also, for purposes of Section 1090, because your request does not identify a specific public official who may be subject to that section, we are only providing informal assistance and do not deem this letter to meet the requirements to permit the requester to offer the letter into evidence in a Commission

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

Finally, pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General's Office and the San Diego County District Attorney's Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

QUESTIONS

1. Is a private attorney who, pursuant to a contract with a government agency, acts as the agency's construction counsel and regularly consults with the agency's Executive Director on whether to settle or litigate claims made against the agency, a "consultant" under the Act and thus subject to the Act's financial disclosure and conflict of interest provisions?

2. Assuming the construction counsel in Question 1 is a "consultant" under the Act and thus subject to the Act's conflict of interest provisions, does the construction counsel have a conflict of interest in either of the following circumstances:

(a) He or she makes a recommendation on, or otherwise participates in, an agency decision on whether to litigate a case and it is reasonably foreseeable the decision will result in the counsel, or the counsel's law firm, being compensated by the agency to handle the litigation?

(b) He or she does not make a recommendation on, and does not otherwise participate in, an agency decision on whether to litigate a case and the counsel, or the counsel's law firm, is later compensated by the agency to handle the litigation?

3. Is there a violation of Section 1090 when the contract with the construction counsel in Question 1 includes a provision under which the agency will pay the counsel or his or her law firm additional compensation to litigate matters on which he or she advises the agency?

CONCLUSIONS

1. Assuming the contract under which the construction counsel provides services to the agency is indefinite in length or of more than a short duration and the attorney's contact with the agency is more than sporadic, he or she would be a consultant under the Act and subject to the Act's financial disclosure and conflict of interest provisions.

2(a). Assuming the construction counsel in Question 1 is a "consultant" under the Act, the counsel makes a recommendation on, or otherwise participates in, an agency decision on whether to litigate a case, and it is reasonably foreseeable the decision will result in the counsel or the counsel's law firm being compensated by the agency to handle the litigation: (i) The counsel <u>will not</u> have a conflict of interest if, pursuant to a contract made with the agency prior to the counsel's participation in the decision, the agency has agreed that it may retain the counsel

or his or her law firm to handle the litigation; but (ii) The counsel will have a conflict if there is no such contract prior to the counsel's participation in the decision.

2(b). Assuming the construction counsel in Question 1 is a "consultant" under the Act and the counsel does not make a recommendation on, or otherwise participate in, an agency decision on whether to litigate a case, the counsel will not have a conflict of interest if the counsel or his or her law firm are compensated by the agency to handle the litigation.

3. There is no violation of Section 1090 if the contract with the construction counsel in Question 1 includes a provision under which the agency will pay the counsel or his or her law firm additional compensation to litigate matters on which he or she advises the agency.

FACTS

A government agency contracts with an individual private attorney or private law firm to act as the agency's construction counsel. In this capacity, the individual attorney or an attorney for the law firm regularly consults with the agency's Executive Director regarding whether to settle or litigate construction-related claims against the agency. You ask several questions regarding the application of the Act and Section 1090 to situations in which the attorney or his or her law firm is later paid by the agency to handle litigation relating to construction matters.

ANALYSIS

I. Application of the Political Reform Act

The Act's conflict of interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) In addition, certain state and local public officials must file periodic Statements of Economic Interests (Form 700) disclosing those personal assets and interests that may be affected during the performance of their official duties. (Sections 87200 - 87350.)

A. Consultant.

The Act defines "public official" to include "every member, officer, employee or *consultant* of a state or local government agency." (Section 82048, emphasis added.) In addition, the Act defines the term "designated employee" to include "any officer, employee, member, or *consultant*" of any agency who meets specified criteria. (Section 82019, emphasis added.) Under the Act, each agency is required to adopt a conflict-of-interest code, which sets forth positions within the agency for which Statements of Economic Interests must be filed. (Section 87300.) Typically an agency's conflict of interest code includes designations for consultants to the agency.

The term "consultant" is defined in Regulation 18701(a)(2). Under this definition, an individual who works pursuant to a contract with an agency is both a public official and designated employee under the Act if he or she engages in the following activities under the contract:

> (A) Makes a government decision whether to:
>
> (i) Approve a rate, rule, or regulation;
>
> (ii) Adopt or enforce a law;
>
> (iii) Issue, deny, suspend, or revoke any permit license, application, certificate, approval, order, or similar authorization or entitlement;
>
> (iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
>
> (v) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
>
> (vi) Grant agency approval to a plan, design, report, study, or similar item;
>
> (vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or
>
> (B) Serves in a staff capacity with the agency and in that capacity participates in making a government decision as defined in regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code section 87302.

(Regulation 18701(a)(2).)

Thus, there are two ways that an individual can become a "consultant,"[2] and thus be a public official and designated employee subject to the Act. First, an individual is a "consultant"

[2] A business entity cannot be a "consultant" under Regulation 18701(a)(2), because the term is applied only to an "individual," that is, a natural person. Thus, the term can only apply to an individual who directly contracts with an agency or, if a firm is the contracting entity, any employee of the firm who actually performs the duties under the contract. (See *Herscher* Advice Letter, No. A-92-278.)

if he or she, pursuant to a contract with a government agency, makes government decisions as described in Regulation 18701(a)(2)(A). Alternatively, an individual may be a "consultant" if he or she, pursuant to a contract with a government agency, serves in a staff capacity and either participates in governmental decisions (as defined) or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency's conflict-of-interest code.

1. Makes government decisions

As described in Regulation 18701(a)(2)(A) above, if an individual is performing services under a contract with a government agency and "makes a government decision" for the agency as listed in that provision, he or she is a consultant. This does not seem to be the case in relation to the construction counsel you describe. Rather than actually "making" government decisions in his or her contracting capacity with the government agency, the construction counsel is instead advising agency personnel, in particular the agency's Executive Director. Therefore, we look to the second manner in which an individual may become a consultant under Regulation 18701(a)(2)(B).

2. Serves in a staff capacity and either Participates in Government Decisions or Performs Duties of Position Listed in Agency's Conflict of Interest Code

Staff Capacity. The phrase "serves in a staff capacity" in subparagraph (B) of Regulation 18701(a)(2) has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have advised that a contractor serves in a staff capacity when the contract calls for work to be performed "over more than one year" on "high level" projects (*Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12 – 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239) and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.) The general facts you describe for the construction counsel's work state that the counsel has regular contact with the Executive Director on agency construction matters. On that basis, if the term of the contract is indefinite or of more than a short duration and the attorney's contact with the agency is more than sporadic, we would conclude that the "staff capacity" prong of the analysis is met.

The next step in the analysis is to determine whether the consultant will either participate in making a governmental decision or will perform "the same or substantially all the same duties . . . that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code. . .."

Participates in making a governmental decision/performing same job as listed in agency conflict of interest code. It appears from the facts that the position of construction counsel is not a position that would be listed in the agency's conflict of interest code. Therefore, to be a consultant, the attorney who performs the duties of this position would have to participate in agency decisions as set forth in Regulation 18702.2. That regulation states that an official participates in making a governmental decision when, acting within the scope of the official's position, the official:

> (a) Negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision referenced in [Regulation 18701(a)(2)(A)];
> (b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:
>
> (1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)]; or
>
> (2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701(a)(2)(A)].

(Regulation 18702.2.)

You indicate that the construction counsel advises the agency's Executive Director on whether to settle or litigate construction-related claims against the agency. This clearly constitutes the giving of advice or recommendations by presenting an opinion that requires the exercise of judgment, the purpose of which is to influence an agency decision as set forth in Regulation 18701(a)(2)(A). Therefore, the construction counsel participates in agency decisions for purposes of the consultant analysis.

3. Conclusion: Consultant. Based on the foregoing analysis, we conclude that, assuming the term of the construction counsel's contract with the agency is indefinite in length or of more than a short duration and the attorney's contact with the agency is more than sporadic, he or she would be a consultant under the Act and subject to the Act's financial disclosure and conflict of interest provisions.

B. Conflict of Interest under the Act

As stated above, Section 87100 prohibits any state or local public official, which includes a government agency "consultant" (Section 82048), from making, participating in making, or

using his or her official position to influence a government decision in which the official has a financial interest specified in Section 87103. A public official has a "financial interest" in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis, set forth in Regulations 18700 – 18708, for determining whether an individual has a conflict of interest under Section 87100.

If, as discussed above, the construction counsel meets the definition of "consultant" for purposes of the Act, he or she would therefore be subject to the Act's conflict of interest provisions. Since your question does not provide the detailed facts necessary to provide a full conflict of interest analysis, we will not proceed into the detail of the eight-step analysis in our regulations.

Instead, we will address the specific issues that arise under your question of whether the construction counsel has a conflict of interest if he or she makes a recommendation to the agency on whether to litigate a case when it is reasonably foreseeable that the counsel or the counsel's law firm will handle the litigation and thus receive additional compensation from the agency.

Under the Act's conflict of interest provisions and Commission regulations, a public official is generally prohibited from participating in a government decision that will have a material financial effect on, among other things, his or her source of income (Sections 87100, 87103(c) and Regulation 18705.3) or the official's "personal finances," such as his or her personal expenses, income, assets or liabilities (Sections 87100, 87103 and Regulations 18703.5, 18705.5). Therefore, when an agency "consultant" such as the construction counsel makes a recommendation to his or her government agency on whether to litigate a case and it is reasonably foreseeable at that time that either the counsel or the counsel's law firm employer will receive additional agency compensation to handle the litigation, it would appear that the counsel has a conflict of interest in advising the agency on this issue.

However, Section 82030(b)(2), as further interpreted by Regulation 18232, exempts from the Act's definition of "income" salary paid by a government agency, including payments to a "consultant." Therefore, arguably, the additional income paid directly to the counsel or to his or her firm to handle the agency's litigation is government salary and exempt from being a financial interest that would create a conflict of interest for the counsel under the Act. However, this does not resolve this issue. First, if the additional compensation for litigation is paid to the counsel's law firm and not directly to the counsel, the payment is not government salary paid to an official by the agency because the law firm itself is the counsel's employer that pays his or her salary. Consequently, the "governmental salary" exception under Section 82030(b)(2) and Regulation 18232 would not apply when the counsel's source of income is his or her law firm and not the government agency. Second, if the additional compensation for litigation is paid by the agency directly to the counsel, there is still an effect on the counsel's "personal finances." Specifically, Regulation 18705.5(b) provides that certain personnel decisions regarding a public official (e.g., hiring, firing, promoting) as well as an agency decision to set a salary for the

official that is different from other agency officials in the same class would still affect the official's personal finances and thus create a conflict of interest for the official if he or she participates in that decision in an official capacity. The agency decision to litigate a case would, in effect, set a "salary" for the official that is different from other agency officials in the same class and therefore remain an issue if the counsel participates in that decision. So, if the counsel's law firm would be receiving the additional compensation to handle the litigation, the counsel is participating in an agency decision affecting his or her source of income (i.e., the law firm). Alternatively, if the counsel would be directly receiving the additional compensation to handle the litigation, he or she is participating in an agency decision affecting his or her personal finances.

Nevertheless, our analysis of this issue does not end at this point. We also must take into account the provisions of the contract between the "consultant," or the "consultant's" firm, and the government agency. The *Eckis* Advice Letter, No. A-93-270, directly addressed this issue as it pertained to a contract city attorney/redevelopment agency counsel whose contract with the city also provided that the attorney's firm, for an additional fee, would represent the city/redevelopment agency in all litigation initiated by or against those entities:

> [W]here a governmental entity has already contracted to permit the consultant to make recommendations that result in the rendering of identified services for an agreed upon price, there is no conflict of interest. In that case, the consultant's participation in governmental decisions will not have a foreseeable financial effect on the consultant's employer. This is because, according to the *McEwen* advice letter [I-92-481], the agency's decision to pay the consultant's employer for the additional services contemplated by the contract was previously made by disinterested agency officials and the consultant's participation merely constitutes the implementation of that preexisting decision.
>
> However, where a consultant makes a recommendation to a public agency that will create additional work and income for the consultant's employer that is beyond the scope of the contract under which the consultant is rendering advice, then a conflict of interest arises. (*In re Mahoney* (1977) 3 FPPC Ops. 69; *Rose* Advice Letter, No. A-84-306.) In that situation, the consultant's recommendation most likely will have a material financial effect on the consultant's employer. [3]

[3] Based on the same rationale, the Commission has made a similar determination regarding state and local agencies contracting with private bond counsel (*Ritchie* Advice Letter, No. 79-045 and *McEwen* Advice Letter, *supra*) and real estate brokers (*Pardee* Advice Letter, I-91-506), all of whom were compensated by the agency based on a percentage of the bond or real estate lease/property value.

This reasoning directly addresses your questions about application of the Act's conflict of interest provisions. If a contract, negotiated or bid upon by an attorney or law firm in a private capacity, under which the attorney provides services to the agency includes a provision that permits the agency to also retain the counsel or his or her law firm to handle litigation on which the counsel has been advising the agency, then there is no conflict of interest under the Act if the counsel or his or her firm receives additional compensation to do so. That is because the government decision to pay this compensation was already made by the agency when the consultant contract was negotiated or bid upon and not at the later time when the agency confers with the counsel on whether to pursue or defend the litigation. However, if there is no provision in the consultant contract under which the agency may also retain the attorney or his or her law firm to handle litigation on which the attorney advises the agency, then the attorney likely would have a conflict of interest under the Act if the attorney or his or her firm receives additional compensation for these services.

II. Application of Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig*, *supra*, at 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id*. at pp. 646-649.)

Normally, we employ the following six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090:

1. Is the official subject to the provisions of Section 1090?
2. Does the decision at issue involve a contract?
3. Is the official making or participating in making a contract?
4. Does the official have a financial interest in the contract?
5. Does either a remote-interest or non-interest exception apply?
6. Does the rule of necessity apply?

However, this analysis is designed to address the common question under Section 1090, where a public official is participating in the making of an agency contract with another person while acting in his or her official capacity. Your question presents a more unique issue, which is whether Section 1090 prohibits an individual, who works under an independent contract that has been negotiated with a government agency, from engaging in official actions pursuant to and

permitted by the contract that may lead to the individual or his or her private employer obtaining additional compensation from the agency. To address this issue, we think it best to dispense with the six-step analysis above and focus directly on this question.

Preliminarily, we set forth some general principles. For the purposes of Section 1090, "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency are prohibited from having personal interests in that agency's contracts. [Citations.]" (*Hub City Solid Waste Services v. City Of Compton*, 186 Cal.App.4th 1114, 1124-1125.) Also, while Section 1090 applies to a broad range of actions by a public official relating to the making of an agency contract, i.e., in addition to actually approving the contract, any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569), those actions must take place in his or her official, rather than private, capacity. (See, e.g., 80 Ops.Cal.Atty.Gen. 41 (1997); *Drexel* Advice Letter, No. I-14-075.) [4] Therefore, while Section 1090 can apply to an individual who works for a government agency under an independent contract, it only applies when that individual participates in making an agency contract in his or her official capacity.

Based on these general principles, Section 1090 does not prohibit a private attorney or law firm from making an independent contract to perform legal services with a government agency so long as the attorney or law firm is acting in its private capacity when negotiating or otherwise presenting the contract to the agency for its approval in some form such as a bid. However, the question here is whether Section 1090 prohibits the attorney or law firm, under the already negotiated contract, from receiving the additional compensation to litigate agency cases on which they have provided the agency legal advice. The Section 1090 issue arises here presumably because the attorney, after the contract is in effect and while acting in his or her official capacity, participates in the agency decision that results in the additional compensation pursuant to the contract.

There is no direct authority on this point in either the statutory provisions applicable to Section 1090 or the courts' interpretations thereof. However, we find two general lines of authority that could possibly be cited to support the application of Section 1090 to this type of contract, which we discuss below.

In *Beaudry v. Valdez* (1867) 32 Cal. 269, the court held that an official who has contracted in his or her private capacity with the government agency before the official is elected or appointed to the agency did not violate the statutory predecessor of Section 1090. This principle has been followed in subsequent Attorney General Opinions. (See 85 Ops.Cal.Atty.Gen. 176 (2002) and 84 Ops.Cal.Atty.Gen. 34 (2001).) However, it is generally

[4] This "official capacity" requirement is echoed in Section 1092 where it states that "[e]very contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member."

recognized that this exemption does not apply when the agency is presented with the option of whether to extend, amend or renegotiate the contract. Based on this logic, it is arguable that, even though the attorney does not violate Section 1090 by working under the privately negotiated contract once it is approved by the agency, each time the agency is faced with whether to litigate a matter, that decision constitutes a separate contract with the attorney and the attorney's participation in that decision is a violation of Section 1090. However, this conclusion is contrary to basic contract law. The construction counsel's contract would encompass compensation for both advising and handling litigation for the city. These matters would be negotiated and determined in advance of any later litigation on which the counsel may represent the city and, as such, would be part of the original contract and not an amendment to it. Therefore, payment of the additional compensation under the contract is not an amendment to the contract and this line of authority would not be applicable here.

Perhaps factually closer to this issue is Attorney General Opinion 66 Ops.Cal.Atty.Gen. 376 (1983). This opinion involved a contract under which a city employed, among others, a city attorney and redevelopment agency counsel whose compensation was based on a percentage of the increase in the assessed value of parcels of property in the city's redevelopment area. As part of the redevelopment process, these attorneys would be involved in an advisory capacity to the city on redevelopment matters and in the discussion, negotiation and drafting of a variety of public contracts that could increase the value of parcels of property in the redevelopment area. Given that the "temptation to suggest, negotiate or approve contracts likely to generate increased tax assessments [would be] alluringly present" in this arrangement, the opinion concluded that these officials' involvement in these contracts violated Section 1090. The compensation arrangement for the construction counsel that we address in this letter is somewhat analogous to the contracts analyzed in this Attorney General Opinion. In both cases, the attorneys would be participating in agency decisions that may result in their additional compensation. However, there is a significant difference between the facts of both. In the Attorney General's Opinion, the contracting decisions in which the attorneys participated involved redevelopment contracts with outside entities made after the attorneys' compensation arrangement was established by the city. The construction counsel contract we address here only involves the original compensation arrangement made by the construction counsel with the city and any additional compensation does not involve a future separate contract with an outside party in which the construction counsel has a financial interest. Thus, there appears to be a significant difference between these matters in that the construction counsel's additional compensation is not the subject of a later contract. On this basis, we also think this line of authority is not applicable here.

Since these lines of authority are inapplicable to the construction counsel contract and we find no other authorities interpreting Section 1090 that would prohibit this contract, we conclude that there is no violation of Section 1090 if the contract with the construction counsel set forth in Question 1 includes a provision under which the agency will pay the counsel or his or her law firm additional compensation to litigate matters on which he or she advises the agency.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

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